Cunningham v. Tampa Electric Co., Inc., 2002-ERA-24 (ALJ Dec. 18, 2002)

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Issue Date: 18 December 2002
Case No.: 2002-ERA-24

In the matter of

JERRY CUNNINGHAM,
Complainant

v.

TAMPA ELECTRIC COMPANY, INC.,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This claim arises from the whistleblower protection provisions under the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, the Clean Air Act ("CAA"), 42 U.S.C. § 5851, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610, Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1367, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971, and the Toxic Substance Control Act ("TSCA"), 15 U.S.C. 2622. These statutes and implementing regulations at 29 CFR Part 24 protect employees from discrimination in retaliation for engaging in protected activity such as reporting health, safety or environmental violations. In this claim, Jerry Cunningham alleges that he was terminated from his position as a Watch Engineer for the Tampa Electric Company ("TECO") as a result of reporting environmental violations to the United States Environmental Protection Agency ("EPA") and the Hillsborough County Environmental Protection Commission ("Hillsborough County EPC"). TECO denies retaliating against Cunningham and contends that he was terminated because he committed a security procedure violation when he entered the plant grounds, and provided false information during the subsequent internal investigation.

STATEMENT OF THE CASE

On May 4, 2001, Cunningham filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA"). He alleged he had been terminated on April 6, 2001, in retaliation for reporting industrial discharges into waters of Tampa Bay, in violation of the whistleblower protections contained in FWPCA, SDWA, TSCA, SWDA, CAA, ERA and CERCLA. The complaint recites the sequence of events leading to his discharge, with supporting documentation attached. [1]

[Page 2]

On May 21, 2002, the Regional Administrator for OSHA issued her findings on the complaint. The Administrator stated that Cunningham had filed a prima facie complaint but the evidence did not support a merit finding because TECO had shown by clear and convincing evidence that the same unfavorable personnel action would have been taken against him in the absence of protected activities.

By letter dated May 27, 2002, and received on May 30, 2002, Cunningham appealed the OSHA findings to the Office of Administrative Law Judges ("OALJ").

The claim was assigned to me on May 31, 2002. On June 7, 2002, I issued a Notice of Hearing to be held on October 8, 2002. On August 27, 2002, Respondent filed a Motion for Summary Decision. I scheduled a telephone conference on September 3, 2002, to learn the status of the claim and whether the parties would be ready to proceed to hearing as scheduled. The record was unclear whether Cunningham was still represented by counsel. During the telephone conference, counsel agreed to continue representing Complainant. The parties agreed that they expected to be able to proceed to hearing as scheduled.

Cunningham filed his Response to Motion for Summary Decision on September 20, 2002. Along with his Response, Cunningham filed a Motion to Compel, Motion to Produce, Accelerate Discovery of DOL Documents and Motion for Extension of Hearing Date until Documents Provided; Motion for Expedited Discovery-Site Visit; Motion in Limine Requesting Hearing-Site Visit with ALJ; and Amended Answers to Interrogatories.[2] As a result of these filings, on September 30, 2002, I issued an order continuing the hearing. Having now had an opportunity to consider fully the parties' positions, I conclude that Respondent's motion for summary decision should be granted for the reasons stated below.

ISSUES RAISED BY THE MOTION FOR SUMMARY DECISION

TECO contends that it is entitled to a judgment as a matter of law because Cunningham will be unable to show that protected activity was a contributing factor in his termination. TECO also contends that it has shown by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. Respondent supported its motion with the transcript of an arbitration hearing on the grievance regarding Cunningham's termination, held April 25, 2002; the applicable

collective bargaining agreement; TECO's Rules and Employee Conduct Policy No. 11; two Security Incident Reports dated March 29, 2001; a blurred picture of a license plate taken by TECO's security cameras; a history report of the security gate dated March 29, 2001; the Arbitration Award dated August 21, 2002, upholding Cunningham's discharge; the OSHA complaint without the attachments; a letter dated June 8, 2001 from TECO to the OSHA investigator; the Regional Administrator's findings; and Cunningham's letter requesting an appeal to OALJ.

In response to the motion, Complainant states that he is evaluating and may appeal the arbitration award; and that the union prevented him from having his own counsel present at the arbitration hearing or introducing the environmental, safety and health complaints he filed, or his whistleblowing allegations. In support of his response, Cunningham submitted his signed affidavit attesting to those facts. He also submitted a handwritten note from a union representative, and a letter from a TECO representative, stating that Cunningham's request to have an outside party (his lawyer) attend the grievance meeting had been denied. In addition to the materials submitted by the parties in support of their positions on the motion, I also considered the attachments to the OSHA complaint, Cunningham's Amended Answers to Interrogatories, and Cunningham's other pending motions in determining whether to grant or deny the motion for summary decision.

[Page 3]

APPLICABLE STANDARDS

These proceedings are governed by the regulations found at 29 CFR Parts 18 and 24. 29 CFR § 18.40(d) provides that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." The opposing party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 CFR § 18.40(c). This rule is modeled on Rule 56 of the Federal Rules of Civil Procedure, pursuant to which "the judge does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, there is no requirement that the moving party support its motion with affidavits or other similar material negating the opponent's claim. *See Celotex*, 477 U.S. at 324; Fed. R. Civ. Pro. 56(b). However, if a motion is properly supported, then the nonmoving party must go beyond the pleadings to overcome

the summary judgment motion. He may not rest upon the mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson.*, 477 U.S. at 248. In this claim, TECO has asserted that Cunningham will be unable to substantiate a prima facie case, and submitted supporting documentation for its affirmative defense. Therefore, Cunningham must respond with sufficient evidence such that the case could be resolved in favor of either party. Ibid. at 249-250.

In order to prevail on his claim, Cunningham must establish by a preponderance of the evidence that the respondent took adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq and other anti-discrimination statutes. *See Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML),[3] ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks,* 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097 (2000). Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case)*; Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act case). Cunningham has not offered direct evidence of discrimination in support of his claim.

[Page 4]

When direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing a prima facie case of discrimination, by showing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The complainant must show that the respondent had knowledge of the protected activity to establish a prima facie case. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

Under the ERA, which contains an affirmative defense which the other whistleblower statutes do not, once a complainant has made a showing that protected activity "was a contributing factor" in the adverse action, the burden of persuasion shifts to the employer

to demonstrate "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(A) and (B). This defense appears to be a statutory adoption of the dual or mixed motive analysis in *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment case).[4] A lesser standard may govern the employer's burden in a mixed motive case under the CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA, because in a mixed motive Title VII case, the burden on the employer is only to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender [or other protected category] into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258. (1989). Of course, if the employer can establish the defense under the higher ERA standard, then the complaint must fail under all the alleged statutes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cunningham was employed as a Watch Engineer for TECO at the Big Ben Power Plant. He had been employed with TECO for approximately 27 years and was a member of Local 108, International Brotherhood of Electrical Workers Union ("IBEW"). According to the complaint filed with OSHA, on September 1, 2000, Cunningham and two other employees discovered a broken water line in the maintenance shop of the power plant causing a spill into the waters of the Tampa Bay. Cunningham and his two co-workers decided that the situation might constitute an environmental violation and decided to fill out a maintenance work request, assigning the repair a high priority. *See* complaint at P.06/35. About a month after reporting the violation, on October 30, 2000, Cunningham noticed that no repairs had been made. He then decided to call the EPA and report the violation. The EPA referred Cunningham to the Hillsborough County EPC, where he made an anonymous complaint of the violation. *See* complaint at P.07/35.

On November 7, 2000, Cunningham followed up on his initial complaint with the Hillsborough County EPC and learned that the case was closed as of November 3, 2000. Cunningham re-filed his initial complaint and explained it was an on-going violation. He then requested that an inspector visit the site. Cunningham alleges that conversation notes were recorded for this complaint, so the complaint was not anonymous. *See* complaint at P.08/35.

As a result of his second compliant, Cunningham alleges that on November 9, 2000, Hillsborough County EPC spoke with Stan Maloy of TECO. Maloy stated that he was going to attempt to have a response to Hillsborough County EPC by that day. *See* complaint at P.09/35. Cunningham alleges that on November 14, 2000, Maloy received a letter from Hillsborough County EPC stating that it would defer the issue to the State of Florida Department of Environmental Protection ("Florida DEP"). *See* complaint at P.10/35.

On March 28, 2001, the Florida DEP held a public televised hearing on TECO's application for a permit modification to their National Pollutant Discharge Elimination System permit. A copy of a portion of the transcript of the hearing was attached to the complaint to OSHA. *See* complaint at P.13/35 et seq. Cunningham alleges that at this hearing, Scott Mishler, a former employee of TECO, brought the violation to the attention of Florida DEP officials. Mishler gave names of employees, past and present violations, and sufficient details to identify Cunningham. *See* complaint at P.16/35. The next day Cunningham was sent home pending an investigation of an alleged security violation. He was terminated on April 6, 2001. Mishler e-mailed counsel that "TECO fired the guy, [J]erry [C]unningham because at the meeting I told the public . . ." *See* complaint at P.17/35. He provided no evidence supporting his conclusory statement of the reason Cunningham was fired.

The alleged security violation related to an unauthorized entry onto the plant grounds described in the materials submitted in support of TECO's motion for summary decision. Employees' cars were equipped with a bar code scanner that was located on a passenger side window of the employees' cars. Tr. at 21. As employees' cars entered the gate, an electronic device read the bar codes, triggered a mechanical arm to open, and caused a green light to flash. The flashing of the green light signaled authorization for the car to enter the plant. Tr. at 24. If the electronic device did not register a car, a machine sounded and a red signal flashed "access denied." Tr. at 60. When access was denied, security personnel were required to ask for the driver's identification. Tr. at 73.

According to the security guards on duty on March 29, 2001, the security gate's mechanical arm was stuck in an upright position, but the stop light was operational. At about 6:00 to 6:30 a.m., a black pick-up truck, with a topper, approached the security gate. The electronic device at the security gate did not register the black pick-up truck's bar code and denied it access to the facility. Notwithstanding the driver's lack of authorization, the driver proceeded through the gate. When the electronic device failed to authorize the truck's entry into the station, Officer Joseph Johnson approached the vehicle and signaled the driver to stop. In accordance with company policy, the Officer asked the driver for his identification. The Officer stated that the driver did not comply with his request, responded "get your gate fixed," and drove through without authorization. As the truck drove through the guard gate, the Officer was able to record the last three digits of the vehicle's license plate. The Officer got into his own vehicle and followed the driver into the employee parking lot. He verified that the truck in the lot was the same vehicle at the guard gate. He obtained the full license plate number and bar code affixed to the passenger window. The Officer entered this information into the company's computer system, which produced a picture of the owner of that vehicle. The Officer identified the owner of the vehicle to be Cunningham and identified Cunningham to be the person who drove through the security gate without authorization. A second officer on duty that morning, Patricia Boone, did not see the truck pull through the gate but corroborated Johnson's account of what transpired after the truck went past. Tr. at 31-57, 59-78; Security Incident Reports.

That same day, the incident was reported to Jack Alagood, an operations manager. Tr. at 181-182. When asked about the incident, Cunningham told his supervisors that the security gate granted him authorization and that the light turned green. Cunningham also stated that he did not speak with Officer Johnson that morning. Cunningham was suspended pending investigation. Tr. 150-151, 184; Amended Answers to Interrogatories, Answer to Question #3. On April 6, 2001, Cunningham was terminated for failure to comply with security procedures and providing false information during internal investigation. Tr. at 87-88; Amended Answers to Interrogatories, Answer to Question #3.

Pursuant to the agreement between TECO and the IBEW, Cunningham filed a written grievance on April 11, 2001. *See* Arbitration Award at 2. Cunningham also filed a complaint with OSHA on May 4, 2001. In his complaint to OSHA, Cunningham alleged that the severity of the punishment was higher than warranted, and that others who drove through the gate were not fired. He claimed that TECO violated the whistleblower protection provisions of the six environmental protection statutes cited above because his termination was in retaliation for reporting the violations.

On April 25, 2002, Cunningham, members of the IBEW, and members of TECO attended an arbitration hearing. At the hearing, the issues were limited to whether the Cunningham was terminated for cause and if not, what was the appropriate remedy. Arbitration Transcript ("Tr.") at 6. According to Cunningham, he was not allowed to testify to his whistleblower allegations. *See* Complainant's Affidavit in support of Response to Motion for Summary Judgment. Rather, testimony was limited to the alleged incident on March 29, 2001. At the arbitration hearing, Cunningham denied that anything unusual happened when he entered the plant on March 29, denied being stopped at the gate, and denied having made the comment about getting the gate fixed. Tr. at 21-22. He testified that the light turned green, and he never saw a guard. Tr. at 24, 149-150, 162. After a review of the evidence submitted at the hearing, the Arbitrator found that TECO had just cause for terminating Cunningham and that the penalty of discharge was reasonable. Arbitration Award.

In essence, Cunningham contends that his discharge for an alleged security breach is a pretext for discrimination in retaliation for his whistleblowing. Cunningham contends that he did not commit the offense, Tr. at 165, and that the severity of the punishment, i.e., termination, "is higher than warranted from driving through the open guard gate, especially when other employees did so, but were not fired. And that the true purpose and cause of termination was to discourage whistle-blowing . . ." Complaint at P.04/35. In his Amended Answers to Interrogatories, Cunningham stated in response to Question # 2, in part:

> The allegation for which the company claims I was fired did not happen, and was too minor to justify firing. No other 27 year employees have been fired for such a minor violation. The Company can not prove a

violation of security, lying or other unsatisfactory employee conduct, and can not prove that the penalty of termination was warranted.

However, Cunningham has failed to come forward with any specific facts to support these allegations.

[Page 7]

29 CFR § 18.40(d) provides that an administrative law judge "may deny the motion [for summary decision] whenever the moving party denies access to information by means of discovery to a party opposing the motion." *See also* Fed. R. Civ. Pro. 56(f); *Brown v. Mississippi Valley State University*, 311 F.3d 328 (5th Cir. 2002). Cunningham has not claimed that he could not respond to TECO's motion because TECO denied him access to information in discovery. His only pending motions regarding discovery relate to a request for the investigative file made to OSHA, which is not a party to this proceeding, and a request by counsel for a site visit, so that he may understand the context in which the claims arose. Although Cunningham identified numerous witnesses who would support his complaint in the Amended Answers to Interrogatories, he did not provide affidavits from any to support his response to TECO's motion for summary decision.

Cunningham's argument that he was not allowed to be represented by counsel or introduce certain evidence at the arbitration hearing is essentially an argument that the award in favor of TECO should not be determinative of the outcome of his whistleblower complaint. The weight to be given to an arbitration award is a matter of discretion. *See Collins v. New York City Transit Authority*, 305 F.3d 113, 119 (2nd Cir. 2002). Even if the arbitrator's award is given no weight because Cunningham was not allowed to introduce evidence of retaliation for whistleblowing, however, Cunningham is not relieved of the obligation imposed by the rules to come forward with evidence to counter TECO's assertion that he will be unable to meet his burden to establish a prima facie case, and the evidence provided by TECO that it would have terminated him absent any protected activity.

I conclude that Cunningham has not offered sufficient evidence to make a prima facie case because the evidence in the record is insufficient to establish the requisite nexus between his protected activity and the adverse action. He cannot establish the requisite nexus because there is no evidence that the persons who made the decision to terminate him knew that he was a whistleblower. The persons who made the recommendation to terminate Cunningham were his supervisor, Sonny Miller, superintendent of operations, and Tom Berry, manager of steamside operations at the Big Bend Plant. Berry testified that they recommended to the Employee Status Review Committee that Cunningham be fired. Tr. at 88-89. Berry testified that he was new at the plant and first became aware of Cunningham when Jack Alagood reported the security breach to him on March 29, 2001. Tr. at 79, 81, 88. Miller did not testify at the arbitration hearing, and there is nothing in the record indicating that he knew Cunningham was a whistleblower when he made that recommendation.[5] The mere facts that Cunningham was identified as a whistleblower in a

government investigator's notes, and at a public hearing, do not give rise to an inference that the decision-makers at TECO were aware of Cunningham's protected activities. The allegation that Cunningham was fired because of his protected activity is supported only by speculation.

Cunningham has also failed to raise a genuine issue whether TECO's proffered reason for terminating him is a pretext for retaliation. Although Cunningham claims that other employees who drove through the gate were not fired, he has not offered any evidence to support that claim. In terms of the ERA's affirmative defense, TECO has established by clear and convincing evidence that it would have terminated him without regard to any protected activity because he failed to stop at the gate, and then lied about it during the company investigation. Even assuming arguendo that he was not the person who "ran the gate," there is no evidence that his superiors did not believe that he was. The inquiry in a case like this is not whether the employee was guilty of misconduct, but whether the employer believed in good faith that the employee had done wrong, and that belief was the reason for termination. *See Equal Employment Opportunity Commission v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000); *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1165-1166 (5th Cir. 1993)*; Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Based on the record before me, I conclude that Cunningham has failed to show that there is a genuine issue of material fact remaining for hearing, and TECO is entitled to summary decision.

RECOMMENDED ORDER

Because Cunningham has failed to offer evidence showing a nexus between his protected activity and his termination, and TECO has proved by clear and convincing evidence that it would have discharged Cunningham in the absence of protected activity, I recommend that Respondent's Motion for Summary Decision be granted, and that Cunningham's complaint filed with the Occupational Safety and Health Administration be dismissed.

ALICE M. CRAFT
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 CFR §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 CFR §§ 24.7(d) and 24.8.

[ENDNOTES]

[1]The file contains only two pages of the original complaint. A May 11, 2001, facsimile transmission from one OSHA office to another contains the only complete copy of the complaint and its attachments. In this recommended decision, page references to the complaint and attachments refer to the numbers recorded by the facsimile machine at the top of each page on May 11, 2001. For example, the facsimile cover sheet is P.01/35.

[2]Except for the request for a site visit, the discovery motions filed by Cunningham on September 20, 2002, and as later amended, do not relate to discovery addressed to Respondent. Rather, Cunningham seeks to compel OSHA to produce documents from its investigative file. The documents in question were withheld by OSHA pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I do not have jurisdiction over FOIA issues. Denial of a FOIA request by a component of the Department of Labor may be appealed to the Solicitor of Labor. 29 CFR § 70.22.

[3]This decision and any others cited to the USDOL/OALJ Reporter are published on the Department of Labor's World Wide Web site at www.oalj.dol.gov.

[4]In *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997), the Eleventh Circuit suggests that the "sprawling body of general employment discrimination law" does not apply because the ERA

> is clear and supplies its own free-standing evidentiary framework. After a complainant has cleared the prima facie gatekeeper test–and assuming she has not been knocked out by a preemptory "clear and convincing" response from the employer–the Secretary is to investigate whether the complainant's behavior actually was "a contributing factor in the unfavorable personnel action." . . . The burden to persuade the Secretary falls upon the complainant, and she must do so by a preponderance of the evidence. . . .If the complainant succeeds, the employer has a second chance to offer "clear and convincing evidence" that it would have done the same thing anyway . . .

115 F.3rd at 1752 (citations omitted). In application, however, the analysis is similar to other employment discrimination cases.

[5]In his Amended Answers to Interrogatories, Cunningham included the following statement referring to Miller:

> The Company's Supervisor Harry Miller said that I was a liability and not an assist. The company did not approve of employees going out side of the company to government agent for help in safety environmental or health matters. The Company has refused to deal with Env and Safety issues including violations and injuries resulting and requiring workers compensation claims, in a timely manner.

Answer to Question #2. That statement is not sufficient to raise a genuine issue whether Miller knew Cunningham was a whistleblower.